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No. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. AND
UNITED STATES FIDELITY & GUARANTY CO., PETITIONERS

v.

ROBERT H. GRAY, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a worker, injured on a fixed platform in the territorial waters of the State of Louisiana while providing maintenance services for platforms located in territorial waters and on the Outer Continental Shelf, is covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 703 F.2d 176. The opinion of the court of appeals denying rehearing (Pet. App. A10-A13) is reported at 711 F.2d 666. The order of the court of appeals dismissing the initial petition for review (Pet. App. A38) is not reported. The decision and order of the Benefits Review Board (Pet. App. A19-A37) is reported at 12 Ben. Rev. Bd. Serv. (MB) 752. The decision and order of the Benefits Review Board (Pet. App. A46-A49) following remand is not reported. The decision and orders of the administrative law judge (Pet. App. A14-A18, A39-A45) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983, and a petition for rehearing was denied on August 8, 1983. The petition for a writ of certiorari was filed

on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Robert H. Gray was employed by petitioner Herb's Welding, Inc., a company that provides welding services to oil field rigs (Pet. App. A2). Gray was assigned to the Bay Marchand marine oil and gas field, which extends beyond Louisiana territorial waters to the Outer Continental Shelf (*ibid.*). His duties included repairing and maintaining oil and gas lines, as well as the fixed platform production structures from which the lines ran (*ibid.*). While on duty Gray lived, ate and slept on a platform situated in Louisiana waters, and worked on platforms located throughout the field, in both Louisiana and Outer Continental Shelf waters (*ibid.*).[1] He was transported to his daily work sites by boat or helicopter (*ibid.*). On the day of his injury, Gray was assigned to a platform in the navigable waters of Louisiana (*ibid.*).[2] While Gray was welding a gas line, an explosion occurred; in trying to run from the area, he sustained a knee injury (*ibid.*).

2. Gray filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.* (Pet. App. A15). Gray's employer and its insurance carrier, petitioner United States Fidelity & Guaranty Co., disputed the claim. After a hearing an administrative law judge determined that Gray was not entitled to LHWCA benefits because he was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. A14-A18).

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[1]Gray estimated that approximately 25% of his time was spent on the Outer Continental Shelf (Pet. App. A26).

[2]The platform on which Gray was injured was fed by a gas flow line that extended out to the Outer Continental Shelf (Pet. App. A26).

Gray appealed to the Benefits Review Board pursuant to 33 U.S.C. (& Supp. V) 921(b), arguing both that he had been "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA and that, in any event, he was entitled to LHWCA benefits by virtue of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (Supp. V) 1333(b).[3] In a divided decision, the Board ruled that Gray was covered under the OCSLA and, as a result, was entitled to LHWCA benefits (Pet. App. A26). The Board reasoned that the OCSLA applied because Gray's employment as a welder was "integrally related to the operations enumerated in Section 1333 of the OCSLA" and "his injury was incurred as a result of such activity" (Pet. App. A26). The Board's dissenting member concluded that the OCSLA was not applicable because, although Gray performed 25% of his work on the Outer Continental Shelf, he was injured while on territorial waters (Pet. App. A27-A37).

3. Petitioners sought judicial review of the Board's decision under 33 U.S.C. 921(c). The court of appeals affirmed without addressing the analysis of the Board. The court determined that Gray was covered under the LHWCA itself; thus, it did not reach the issue of coverage under the OCSLA (Pet. App. A3).

The court decided, as a threshold issue, that "the LHWCA can reach an offshore oil field worker injured upon a fixed platform located in Louisiana waters" (Pet.

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[3]43 U.S.C. (Supp. V) 1333(b) provides that:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

App. A3). The court then concluded that the LHWCA's situs and status tests for coverage were met in this case. The situs of the injury was within the "expanded shoreside coverage of the Act" (*id.* at A7), because the platform upon which Gray was injured is "essential to and customarily used in the loading and unloading of crews, supplies and oil. [Its] function is precisely that of wharves over navigable waters" (*id.* at A4). The status test was also satisfied because Gray's duties were "a central part" of the offshore drilling process, and offshore drilling is "maritime commerce" (*id.* at A8-A9).

ARGUMENT

The court of appeals correctly applied well-established principles regarding coverage under the Longshoremen's and Harbor Workers' Compensation Act to the particular facts of this case. The court's conclusion that Gray's injury occurred upon a covered situs and that he was "engaged in maritime employment" does not conflict with the views of this Court or of any other court of appeals and does not warrant further review.

1. Recent decisions of this Court have established that coverage under the amended LHWCA hinges on both the situs of the injury and the status of the injured worker. *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 16-17; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977).

The court of appeals correctly concluded that the situs of Gray's injury—a fixed marine petroleum production platform—falls within the expanded shoreside coverage of the amended LHWCA. In 1972, Congress expanded the definition of "navigable waters" to include certain adjoining land areas, including piers and wharves. Section 3(a), 33 U.S.C. 903(a); *Director, OWCP* v. *Perini North River Associates*, slip op. 1. In *Rodrigue* v. *Aetna Casualty & Surety Co.*,

395 U.S. 352, 361, 365-366 (1969), this Court declared that fixed offshore platforms are artificial islands, and likened such structures to wharves. See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Indeed, as the court of appeals aptly noted, marine platforms serve the essential functions of wharves in that they are "used in the loading and unloading of crews, supplies and oil" (Pet. App. A4). Such platforms, therefore, are a covered situs for purposes of the LHWCA.[4]

The court of appeals also correctly determined that Gray satisfied the Section 2(3) status test for LHWCA coverage (33 U.S.C. 902(3)). The basic test for determining whether a worker is an employee under Section 2(3) is whether he is "engaged in maritime employment." The test uniformly employed by the courts of appeals, including the court below, in making that determination for land-based workers is whether an employee's activities have a "realistically significant relationship to traditional maritime activity" (Pet. App. A8). See, *e.g.*, *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1052 (5th Cir. 1982) (en banc), cert. denied, No. 82-605 (Jan. 24, 1983); *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Odom Const. Co.* v. *Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981). This test accords with this Court's conclusion that "maritime employment" is not

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[4]That the platform may not have been "used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron)" (Amicus Br. 4) is of no consequence. The platform was clearly utilized in maritime commerce, and Gray's activities were essential to maintaining the maritime utility of the structure. *Odom Const. Co.* v. *Department of Labor*, 622 F.2d 110, 114 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 757 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

limited to the occupations specifically enumerated in Section 2(3). *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77-78 n.7 (1979).[5]

The court of appeals' application of the "realistically significant relationship" test in this case is undoubtedly correct. As the court explained, "[o]ffshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce" (Pet. App. A9). See *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1052-1053, aff'g 664 F.2d 463, 464-466 (5th Cir. 1981); *Pippen* v. *Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981). See also *Thornton* v. *Brown & Root, Inc.*, 707 F.2d 149, 153 (5th Cir. 1983), petition for cert. pending, No. 83-343. Because the maintenance of marine oil and gas lines and fixed platforms is essential to the effectuation of the offshore drilling process, it follows that such activity entails traditional maritime activity (Pet. App. A8-A9), in the same manner as does construction and repair of such landside facilities as piers and wharves.[6]

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[5]In *Director, OWCP* v. *Perini North River Associates*, slip op. 19-21, this Court rejected application of the "significant relationship" test to employees injured on navigable waters because, in establishing the separate "situs" and "status" tests in the 1972 amendments to the LHWCA, Congress did not intend to withdraw coverage from employees "traditionally covered by the Act, who were injured in the course of their employment on navigable waters as previously defined." The Court did not discuss whether the test properly applied to workers injured on land (*id.* at 21 n.27). See Pet. App. A8.

[6]See *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) (pier repair); *Trotti & Thompson* v. *Crawford*, 631 F.2d 1214 (5th Cir. 1980) (pier construction); *Odom Const. Co.* v. *Department of Labor*, 622 F.2d 110 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981) (maintenance of mooring block); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981) (maintenance of shipyard buildings and machinery); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) (maintenance of scrap metal cargo processing machinery); *Price* v. *Norfolk & Western Ry.*, 618 F.2d 1059 (4th Cir. 1980) (maintenance of shoreside shiploading machinery); *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) (maintenance of shipyard machinery); *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981) (maintenance of grain cargo processing and loading machinery).

Furthermore, the fact that Gray spent a significant amount of time traveling on the water in the course of his employment underscores his "maritime employment" status under Section 2(3). Workers traveling over or through water en route to offshore drilling platforms are performing maritime activities within the coverage of the LHWCA. *Nalco Chemical Corp.* v. *Shea*, 419 F.2d 572, 574 (5th Cir. 1969). See also *Ward* v. *Director, OWCP*, 684 F.2d 1114, 1116-1117 (5th Cir. 1982), cert. denied, No. 82-566 (Jan. 24, 1983) (fish-spotter airplane pilot, assisting fleet of fishing boats, possesses significant relationship to maritime activities). This result is not changed by the fact that Gray arguably did not spend a "substantial portion" of his time in such travel,[7] or that he was not engaged in such activity at the time he was injured.[8]

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[7]*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 273 ("when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations"). Accord, *Schwabenland* v. *Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982), cert. denied, No. 82-523 (Jan. 24, 1983); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343 (1st Cir. 1981); *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981).

[8]See, *e.g.*, *Browning* v. *B. F. Diamond Construction Co.*, 676 F.2d 547, 548-549 (11th Cir. 1982), cert. denied, No. 82-4 (Jan. 24, 1983); *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 754 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140 (9th Cir. 1978); *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 274 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977).

2. Petitioners contend (Pet. 8-12) that the court of appeals' conclusion that offshore drilling is maritime commerce conflicts with this Court's holdings in *Rodrigue* v. *Aetna Casualty & Surety Co., supra*, and *Chevron Oil Co.* v. *Huson, supra*. In *Rodrigue* and *Chevron*, the Court held that, for admiralty law purposes, fixed platforms on the Outer Continental Shelf are to be treated as islands or as federal enclaves within a landlocked state, not as vessels. See 43 U.S.C. (Supp. V) 1333(a)(1). *Rodrigue* and *Chevron*, however, do not address the application of the LHWCA to injuries in territorial waters or on the Outer Continental Shelf. The decisions, therefore, are inapposite to the status question in this case.

Rodrigue and *Chevron* were decided on the basis of principles that govern admiralty tort jurisdiction and that strictly require injury on the water.[9] The amended LHWCA no longer requires that the injury occur on actual navigable waters but, rather, contains distinct situs and status requirements of its own. Accordingly, this Court's conclusion in *Rodrigue* and *Chevron* that fixed offshore platforms are extensions of land similar to wharves aids Gray rather than petitioners: although piers and wharves are extensions of land, they nevertheless clearly meet the situs requirement of Section 3(a) of the LHWCA and are instrumentalities of maritime commerce covered by Section 2(3).

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[9]In *Rodrigue*, this Court was asked to determine whether a wrongful death action arising out of an injury on an oil drilling platform on the Outer Continental Shelf was governed by Louisiana law or the federal Death on the High Seas Act. This Court concluded that, under the OCSLA, Louisiana law governed. See 43 U.S.C. (Supp. V) 1333(a)(2). In *Chevron*, this Court similarly determined that the Louisiana statute of limitations, as opposed to the admiralty doctrine of laches, governed an injury on an oil drilling platform on the Outer Continental Shelf under 43 U.S.C. (Supp. V) 1333(a)(2).

3. Petitioners next contend (Pet. 13-15) that Gray cannot be within the LHWCA's intended coverage because Congress rejected the inclusion of offshore oil workers within the coverage of the Act. See proposed "Marine Petroleum Workers' Compensation Act," S. 1547, 92d Cong., 1st Sess. (1971) (the Tower bill), *reprinted in Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 24-27 (1972).

The Fifth Circuit, sitting en banc in *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1053, has correctly rejected petitioners' argument. As the *Boudreaux* court explained, the Tower bill would have extended LHWCA coverage to *all* marine petroleum extraction workers. As a result, crew members on movable oil barges, who would otherwise have been entitled to pursue compensatory damages under the Jones Act, 46 U.S.C. 688, would have been relegated to compensation remedies under the LHWCA. Moreover, at the time the Tower bill was proposed, both industry and labor agreed that other marine petroleum workers, such as those injured on navigable waters or on fixed platforms on the Outer Continental Shelf, were covered by the LHWCA. Accordingly, the only possible inference to be derived from the rejection of the Tower bill (680 F.2d 1053):

> is that Congress felt that no new legislation was required to afford LHWCA coverage to non-crew oil-workers injured on navigable waters, and that it did not wish to deprive "crew" oil-workers of their more lucrative Jones Act recovery.

Indeed, were there any question concerning Congress's clear intent to provide offshore oil workers with LHWCA coverage, it is resolved by the fact that, in the OCSLA,

Congress expressly extended LHWCA coverage to injuries occurring on the Outer Continental Shelf. 43 U.S.C. (Supp. V) 1333(b).[10] In sum, congressional action with respect to offshore oil workers is consistent with the court of appeals' conclusion that the marine drilling process is maritime commerce. And, given that conclusion, the court of appeals correctly determined that because Gray's duties had a significant relationship to such activity, he was covered by the LHWCA.[11]

4. Although the court of appeals did not address the issue, respondent Gray is entitled to LHWCA benefits for the additional reason that he was injured "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources * * * of the subsoil and seabed of the outer Continental Shelf." 43 U.S.C. (Supp. V) 1333(b). The OCSLA automatically extends the coverage of the LHWCA to provide compensation for such injuries. *Ibid.*; *Pippen* v. *Shell Oil Co.*, 661 F.2d at 382 n.5. "[T]here is no need for an employee to whom OCSLA applies to satisfy independently the two-fold situs and status test for LHWCA coverage." *Stansbury* v. *Sikorski*

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[10]Contrary to petitioners' suggestion (Pet. 15 n.14), it would make little sense for this Court to conclude that, although Congress specifically provided LHWCA coverage of marine petroleum workers working on the Outer Continental Shelf, it excluded from coverage like employees working in territorial waters. Rather than giving effect to congressional intent, such a holding would reintroduce the "checkered" LHWCA coverage that the 1972 amendments to the Act were designed to eliminate. See generally *Northeast Marine Terminal Co.* v. *Caputo*, *supra*.

[11]*Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), relied upon by petitioners (Pet. 17), is inapposite. That case involved injuries sustained on a wharf before the shoreside coverage of the LHWCA was extended to such locales in 1972.

Aircraft, 681 F.2d 948, 951 (5th Cir. 1982), cert. denied, No. 82-824 (Dec. 13, 1982) (citation omitted).[12]

Despite the fact that Gray's injury occurred in Louisiana territorial waters, his employment was "integrally related" to marine petroleum activities on the Outer Continental Shelf, and his injury was incurred as a result of such activities (Pet. App. A26). Having thus met the test provided in 43 U.S.C. (Supp. V) 1333(b), Gray was entitled to LHWCA benefits. See *Stansbury* v. *Sikorski Aircraft, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12]The OCSLA imposes no situs-of-injury requirement. *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 950, 951 n.2. See also *Higginbotham* v. *Mobil Oil Corp.*, 545 F.2d 422, 432 & n.11 (5th Cir. 1977) (injuries sustained while on the Outer Continental Shelf, but off a platform, are covered), reversed on other grounds, 436 U.S. 618 (1978); *Nations* v. *Morris*, 483 F.2d 577, 584 (5th Cir.), cert. denied, 414 U.S. 1071 (1973) (same).

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